IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1282

SERVICE ARMAMENT CO., for itself and
as successor in interest to
NAVY ARMS CO., INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI to the UNITED STATES COURT OF CLAIMS

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Claims entered in the above case on December 14, 1977.

OPINION BELOW

The opinion of the United States Court of Claims, dated December 14, 1977, is not yet officially reported, but is appended to this petition at p. 1a.

JURISDICTION

The judgment of the United States Court of Claims was made and entered on April 18, 1977, and this petition is being filed within ninety days after entry of that judgment. The jurisdiction of this Court is invoked under 28 U.S.C. § 1255.

QUESTIONS PRESENTED

1. Whether replicas of antique firearms are subject to the manufacturers excise tax on firearms imposed by I.R.C. § 4181.

2. Whether the Treasury Department may, by regulation, expand the application of the manufacturers excise tax on firearms to tax antique firearms in the face of repeated Congressional pronouncements exempting antique firearms from taxation and regulation.

3. Whether the decision of the Court of Claims is contrary to the decision of the Supreme Court of the United States in *Sonzinsky v. United States*, 303 U.S. 506 (1936).

STATUTES INVOLVED

18 U.S.C. § 921

Definitions

(a) As used in this chapter –

(3) The term "firearm" means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm.

(4) The term "destructive device" means–

(A) any explosive, incendiary, or poison gas–

(i) bomb,

(ii) grenade,

(iii) rocket having a propellant charge of more than four ounces,

(iv) missile having an explosive or incendiary charge of more than one-quarter ounce,

(v) mine, or

(vi) device similar to any of the devices described in the preceding clauses;

(B) any type of weapon (other than a shotgun or a shotgun shell which the Secretary finds is generally recognized as particularly suitable for sporting purposes) by whatever name known which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, and which has any barrel with a bore of more than one-half inch in diameter; and

(C) any combination of parts either designed or intended for use in converting any device into any destructive described in subparagraph (A) or (B) and from which a destructive device may be readily assembled.

The term "destructive device" shall not include any device which is neither designed nor redesigned for use as a weapon; any device, although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line throwing, safety, or similar device; surplus ordnance sold, loaned, or given by the Secretary of the Army pursuant to the provisions of section 4684 (2), 4685, or 4686 of title 10; or any other device which the Secretary of the Treasury finds is not likely to be

used as a weapon, is an antique, or is a rifle which the owner intends to use solely for sporting, recreational or cultural purposes.

(5) The term "shotgun" means a weapon designed or redesigned, made or remade, an intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed shotgun shell to fire through a smooth bore either a number of ball shot or a single projectile for each single pull of the trigger.

(6) The term "short-barreled shotgun" means a shotgun having one or more barrels less than eighteen inches in length and any weapon made from a shotgun (whether by alteration, modification, or otherwise) if such weapon as modified has an overall length of less than twenty-six inches.

(7) The term "rifle" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed metallic cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger.

(8) The term "short-barreled rifle" means a rifle having one or more barrels less than sixteen inches in length and any weapon made from a rfile (whether by alteration, modification, or otherwise) if such weapon, as modified, has an overall length of less than twenty-six inches.

(9) The term "importer" means any person engaged in the business of importing or bringing firearms or ammunition into the United States for purposes of sale or distribution; and the term "licensed importer" means any such person licensed under the provisions of this chapter.

(10) The term "manufacturer" means any person engaged in the manufacture of firearms or ammunition for purposes of sale or distribution; and the term "licensed manufacturer" means any such person licensed under the provisions of this chapter.

(11) The term "dealer" means (A) any person engaged in the business of selling firearms or ammunition at wholesale or retail, (B) any person engaged in the business of repairing firearms or of making or fitting special barrels, stocks, or trigger mechanisms to firearms, or (C) any person who is a pawnbroker. The term "licensed dealer" means any dealer who is licensed under the provisions of this chapter.

(12) The term "pawnbroker" means any person whose business or occupation includes the taking or receiving, by way of pledge or pawn, of any firearm or ammunition as security for the payment or repayment of money.

(13) The term "collector" means any person who acquires, holds, or disposes of firearms or ammunition as curios or relics, as the Secretary shall by regulation define, and the term "licensed collector" means any such person licensed under the provisions of this chapter.

* * *

(16) The term "antique firearm" means–

(A) any firearm (including any firearm with a matchlock, flintlock, percussion cap, or similar type of ignition system) manufactured in or before 1898; and

(B) any replica of any firearm described in subparagraph (A) if such replica–

(i) is not designed or redesigned for using rimfire or conventional centerfire fixed ammunition, or

(ii) uses rimfire or conventional centerfire fixed ammunition which is no longer manufactured in the United States and which is not readily available in the ordinary channels of commercial trade.

(17) The term "ammunition" means ammunition or cartridge cases, primers, bullets, or propellent powder designed for use in any firearm.

I.R.C. § 4181

Imposition of tax

There is hereby imposed upon the sale by the manufacturer, producer, or importer of the following articles a tax equivalent to the specified percent of the price for which so sold:

Articles taxable at 10 percent)
Pistols.
Revolvers.

Articles taxable at 11 percent–
Firearms (other than pistols and revolvers)
Shells, and cartridges.

I.R.C. § 4182

Exemptions

(a) Machine guns and short barrelled firearms.–The tax imposed by section 4181 shall not apply to any firearm on which the tax provided by section 5811 has been paid.

(b) Sales to Defense Department.–No firearms, pistols, revolvers, shells, and cartridges purchased with funds appropriated for the military department shall be subject to any tax imposed on the sale or transfer of such articles.

(c) Records.–Notwithstanding the provisions of sections 922(b) (5) and 923(g) of title 18, United States Code, no person holding a Federal license under chapter 44 of title 18, United States Code, shall be required to record the name, address, or other information about the purchaser of shotgun ammunition, ammunition suitable for use only in rifles generally available in commerce, or component parts for the aforesaid types of ammunition.

I.R.C. § 5845

Definitions

For the purpose of this chapter–

(a) Firearm.–The term "firearm" means (1) a shotgun having a barrel or barrels of less than 18 inches in length; (2) a weapon made from a shotgun if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 18 inches in length; (3) a rifle having a barrel or barrels of less than 16 inches in length; (4) a weapon made from a rifle if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 16 inches in length; (5) any other weapon, as defined in subsection (e); (6) a machinegun; (7) a muffler or a silencer for any firearm whether or not such firearm is included within this definition; and (8) a destructive device. The term "firearm" shall not include an antique firearm or any device (other than a machinegun or destructive device) which, although

designed as a weapon, the Secretary finds by reason of the date of its manufacture, value, design, and other characteristics is primarily a collector's item and is not likely to be used as a weapon.

(b) **Machinegun.**—The term "machinegun" means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any combination of parts designed and intended for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.

(c) **Rifle.**—The term "rifle" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger, and shall include any such weapon which may be readily restored to fire a fixed cartridge.

(d) **Shotgun.**—The term "shotgun" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed shotgun shell to fire through a smooth bore either a number of projectiles (ball shot) or a single projectile for each pull of the trigger, and shall include any such weapon which may be readily resotred to fire a fixed shotgun shell.

(e) **Any other weapon.**—The term "any other weapon" means any weapon or device capable of being concealed

on the person from which a shot can be discharged through the energy of an explosive, a pistol or revolver having a barrel with a smooth bore designed or redesigned to fire a fixed shotgun shell, weapons with combination shotgun and rifle barrels 12 inches or more, less than 18 inches in length, from which only a single discharge can be made from either barrel without manual reloading, and shall include any such weapon which may be readily restored to fire. Such term shall not include a pistol or a revolver having a rifled bore, or rifled bores, or weapons designed, made, or intended to be fired from the shoulder and not capable of firing fixed ammunition.

(f) **Destructive device.**—The term "destructive device" means (1) any explosive, incendiary, or poison gas (A) bomb, (B) grenade, (C) rocket having a propellant charge of more than four ounces, (D) missile having an explosive or incendiary charge of more than one-quarter ounce, (E) mine, or (F) similar devices; (2) any type of weapon by whatever name known which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, the barrel or barrels of which have a bore of more than one-half inch in diameter, except a shotgun or shotgun shell which the Secretary finds is generally recognized as particularly suitable for sporting purposes; and (3) any combination of parts either designed or intended for use in converting any device into a destructive device as defined in subparagraphs (1) and (2) and from which a destructive device may be readily assembled. The term "destructive device" shall not include any device which is neither designed nor redesigned for use as a weapon; any device, although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line throwing, safety, or similar device; surplus ordnance sold, loaned, or given by the Secre-

tary of the Army pursuant to the provisions of section 4684(2), 4685, or 4686 of title 10 of the United States Code; or any other device which the Secretary finds is not likely to be used as a weapon, or is an antique or is a rifle which the owner intends to use solely for sporting purposes.

(g) **Antique firearm.**—The term "antique firearm" means any firearm not designed or redesigned for using rim fire or conventional center fire ignition with fixed ammunition and manufactured in or before 1898 (including any matchlock, flintlock, percussion cap, or similar type of ignition system or replica thereof, whether actually manufactured before or after the year 1898) and also any firearm using fixed ammunition manufactured in or before 1898, for which ammunition is no longer manufactured in the United States and is not readily available in the ordinary channels of commercial trade.

(h) **Unserviceable firearm.**—The term "unserviceable firearm" means a firearm which is incapable of discharging a shot by means of an explosive and incapable of being readily restored to a firing condition.

(i) **Make.**—The term "make", and the various derivatives of such word, shall include manufacturing (other than by one qualified to engage in such business under this chapter), putting together, altering, any combination of these, or otherwise producing a firearm.

(j) **Transfer.**—The term "transfer" and the various derivaties of such word, shall include selling, assigning, pledging, leasing, loaning, giving away, or otherwise disposing of.

(k) **Dealer.**—The term "dealer" means any person, not a manufacturer or importer, engaged in the business of

selling, renting, leasing, or loaning firearms and shall include pawnbrokers who accept firearms as collateral for loans.

(l) **Importer.**—The term "importer" means any person who is engaged in the business of importing or bringing firearms into the United States.

(m) **Manufacturer.**—the term "manufacturer" means any person who is engaged in the business of manufacturing firearms.

STATEMENT

Your petitioner, Service Armament Co., hereinafter "Service," is a manufacturer and importer of replicas of antique firearms. Such replicas, as the pre-1898 weapons after which they are modeled, are muzzle-loaders ". . . in which powder and a projectile are inserted and the powder is ignited through the use of a flint or a cap." P.2a, *infra.*

Service commenced an action in the United States Court of Claims to recover manufacturers excise taxes which the United States had collected under the supposed authority of I.R.C. 4181.

Service alleged in its petition that the replicas upon which the tax was levied were not pistols, revolvers, or firearms subject to the manufacturers excise tax pursuant to I.R.C. 4181. Upon cross motions for summary judgment, the United States Court of Claims, per Cowen, Senior Judge, ruled that muzzle-loading replicas of antique firearms are subject to the manufacturers excise tax upon firearms and dismissed Service's petition.

REASONS FOR GRANTING THE WRIT

Your petitioner prays issuance of a Writ of Certiorari to the Court of Claims so that the Court may determine whether those who manufacture and import muzzle-loading replicas of antique firearms can be compelled to pay the manufacturer's excise tax on firearms in the face of repeated Congressional pronouncements that such replicas are not firearms and not subject to taxation and regulation as firearms.

The manufacture and sale of replicas of antique firearms began in earnest in 1959. Like the pre-1898 firearms after which such replicas are modeled, they are capable of firing a projectile, but only after powder and the projectile are inserted through the muzzle and the powder is ignited by a flint or cap. *See*, p. 2a, *infra*. Service sought a ruling by the Court of Claims that such replicas were not firearms for the purposes of the manufacturers excise tax on firearms. I.R.C. § 4181, *et seq.* In support of its position, Service offered the statutory definition of "firearm" contained in I.R.C. § 5845 exempting replicas, the statutory definition of firearm contained in 18 U.S.C. § 921 exempting replicas, the legislative history of I.R.C. § 4181 and other Congressional pronouncements that such replicas should be exempt from taxation and regulation. The Court of Claims ruled that such replicas fall within the definition of firearm contained in 26 C.F.R. § 48.4181-2 and were, therefore, subject to the tax.

The manufacturers excise tax on firearms dates back to 1918. *See*, 40 Stat. 1057 (1918). 40 Stat. 1057. *See*, 44 Stat. 1970 (1926). 44 Stat. 1970. A tax upon the manufacture, production or importation of firearms was contained in the Revenue Act of 1932. *See*, 47 Stat. 264 (1932).

The National Firearms Act, now I.R.C. § 5801. *et seq.*, was enacted on June 26, 1934. *See*, 48 Stat. 1240 (1934). 48 Stat. 1240. Like the excise tax, the National Firearms Act was a revenue measure, *Sonzinsky v. United States*, 300 U.S. 506 (1936). In that Act, the term "firearm" was defined for the first time. The Department of the Treasury was quick to adopt regulations defining the term "firearm" consistent with that contained in the National Firearms Act. *See*, Article 58, Treas. Reg. 46 (1935).

The Internal Revenue Act of 1939 contained two provisions pertaining to firearms. Chapter 25 contained a tax upon pistols and revolvers (Subchapter A) and a tax upon machine guns and certain other firearms. Int. Rev. Code 1939, ch. 25, § 2700 *et seq.*, 53 Stat. 288. Chapter 29 contained a tax upon firearms, shells and cartridges. Int. Rev. Code 1939, ch. 29, § 3407, 53 Stat. 412.

The revenue acts applicable to firearms were again modified and reorganized with the enactment of the Internal Revenue Code of 1954. 68A Stat. 1, *et seq.* Subchapter A of Chapter 25 of the Internal Revenue Code of 1939 (Int. Rev. Code 1939, ch. 25, § 2700 *et seq.*, 53 Stat. 288) and the tax on firearms, shells and cartridges (Int. Rev. Code 1939, ch. 29, § 3407, 53 Stat. 412) were combined and designated I.R.C. § 4181 *et seq.* The National Firearms Act was codified at I.R.C. § 5801 *et seq.*, Chapter 53 of the Code.

The Court of Claims ruled that by its silence respecting the Treasury Department's interpretation of the term firearm, Congress approved that interpretation. *See*, p. 8, *infra*. But Congress in enacting the Internal Revenue Code of 1954, (I.R.C. § 1, *et seq.*), clearly evidenced its dissatisfaction with the definition of firearm employed by the Treasury Department.

As a part of the 1954 Code, Congress enacted I.R.C. § 5848 (now I.R.C. § 5845). That section was enacted by Congress to make clear that antique firearms and muzzle-loading replicas were not firearms. In so providing Congress noted that it was never its intention that weapons which did not use fixed ammunition be considered firearms. U.S. CODE CONG. & AD. NEWS (1954) pp. 4542, 5209. Congress specifically disapproved of the definition of firearms which the Government now employs.

The Court of Claims ruled that, since Congress did not modify I.R.C. § 4181 in addition to enacting I.R.C. § 5848, the exemption for replicas contained therein applied only to Chapter 53 of the Code. *See*, p. 6a, *infra*. Had not the excise tax and the National Firearms Act the common roots already outlined, the Court's reasoning might have been sound, but prior to 1954 the Treasury Department had not varied the definition applicable to the excise tax from that which it had distilled from the National Firearms Act. Congress had every reason to believe that I.R.C. § 5848 would guide the Treasury Department in levying the excise tax as had Section 2723 of the Internal Revenue Code of 1939 and the definitional provision of the National Firearms Act before it.

The Treasury Department's refusal to discard a definition which Congress clearly indicated to be contrary to its intent was unreasonable, and its reintroduction of a regulation employing that definition in 1960 does nothing to disturb the fact that Congress never intended the excise tax on firearms to apply to muzzle-loading replicas.

Were the foregoing insufficient evidence of Congress' intent to exempt replicas from the excise tax, Congress spoke more recently in enacting the Gun Control Act of 1968. 82 Stat. 228 and 82 Stat. 1214, now codified at 18 U.S.C.

§ 921 and 18 U.S.C. App. § 1202(c). While the Court is quick to note that such act was enacted to fight crime, the Court failed to acknowledge the fact that it was also intended to regulate all businesses engaged in the importing, dealing and manufacturing of firearms. *United States v. Petrucci*, 486 F.2d 329 (9th Cir. 1973), *cert. denied*, 416 U.S. 931 (1974).

With enactment of the Gun Control Act of 1968, Congress strictly regulated the manufacture, importation and sale of firearms, including the licensing of manufacturers, importers, dealers and even collectors of firearms. Again, at 18 U.S.C. § 921(a)(3), (16), Congress defined the term "firearm" and again Congress expressly excluded muzzle-loading replicas from such definition.

The Court of Claims ruled that there was no evidence that Congress intended any congruency between the Gun Control Act of 1968, the National Firearms Act, and the excise tax on firearms. The very section cited by the Court of Claims, I.R.C. § 5845, demonstrates that such a position is unsupportable. For in addition to defining various terms in 18 U.S.C. § 921, the Gun Control Act of 1968 went on to amend Section 5848 of the Internal Revenue Code of 1954; that section became I.R.C. § 5845. The clear purpose of such amendment was to extend the definitions contained in the Gun Control Act of 1968 to the Internal Revenue Code. In the wake of such amendment, the two share identical or near identical definitions for "firearm," "antique," "rifle," "shotgun," "destructive device," "importer," "manufacturer," and "dealer."

A year later Congress enacted Pub. L. 91-128 § 5, 83 Stat. 269 (1969). That provision, codified as I.R.C. § 4182(c), clearly manifests Congress' intention that the excise tax, of which Section 4182(c) is a part, and the Gun Control

Act of 1968 be parts of a common scheme of federal firearms regulation. I.R.C. § 4182(c) which has application to both the excise tax and the Gun Control Act of 1968, clearly is governed by the definitions of 18 U.S.C. § 921. It would indeed be absurd to apply these definitions to one section of the excise tax provision while permitting the Treasury Department to employ a definition directly contrary to that Section elsewhere in the excise tax.

Service submits that the foregoing can only be interpe ted to mean that Congress intended that provisions exempting muzzle-loading replicas from taxation and regulation be applicable to the manufacturer's excise tax on firearms. Even setting aside that argument, however, how can the Treasury Department be permitted to ignore Congress' pronouncements that muzzle-loading replicas do not fit within the ordinarily accepted definition of firearm? *See*, U.S. CODE CONG. & AD. NEWS (1954), p. 5209.

By allowing the Treasury Department to do just that, the Court of Claims has fostered a number of confusing if not absurd effects:

–One who is not a manufacturer and whose goods (replicas) are not firearms under either the Gun Control Act of 1968 and the National Firearms Act must nevertheless pay a manufacturers excise tax on firearms.

–An excise tax which was enacted to impose a coextensive tax upon firearms and the ammunition used therein no longer had that effect; this disturbed even the Court of Claims. *See*, pp. 9a-10a, *infra*.

–Tax revenues which were to serve as payment by those who used wildlife reserves, i.e., hunters, for the maintenance of such preserves are now collected from those who do not enjoy such use. *See*, 16 U.S.C. § 669(b).

In 1970, the Treasury Department opposed Congress' plan to earmark the revenues from I.R.C. § 4181 taxes on pistols and revolvers, arguing that the purchasers of such firearms derived only a *de minimis* benefit from wildlife resources, and, consequently, such earmarking would contravene the principle that "those who pay earmarked taxes should benefit from the programs financed by those taxes." U.S. CODE CONG. & AD. NEWS (1970) p. 4370. Certainly, the purchasers of antiques and replicas derive even a lesser benefit, if any.

As was noted in *United States v. National Marine Engineers' Beneficial Association*, 294 F.2d 385, 391 (2nd Cir. 1961), Courts, in construing statutes, must look not merely to the letter of the statute, but to the legislative intent which can be gleaned by considering the cause and necessity of the statute's enactment, by comparing one part of a statute with another, and by examining its history.

In any event, statutes are to be construed to resolve doubt and not to create confusion. *Mead Corp. v. C.I.R.*, 116 F.2d 187 (3d Cir. 1941).

Critical to any analysis of the decision below is a recognition that it is founded upon acceptance of the Government's argument that the National Firearms Act and the Gun Control Act of 1968 were "crime fighting" statutes with no relationship to the revenue collection sections of the Internal Revenue Code. Only by accepting that erroneous thesis could the court below ignore the definitions of firearms set forth in I.R.C. § 5845 and 18 U.S.C. § 921. Said holding is clearly to the decision of the Supreme Court of the United States in *Sonzinsky v. United States*, 303 U.S. 506 (1936), wherein the constitutionality of the National Firearms Act was upheld on grounds that it was a valid revenue statute.

CONCLUSION

For the foregoing reasons, the petition for Writ of Certiorari should be granted.

Respectfully submitted,

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In the United States Court of Claims

No. 348-76

(Decided December 14, 1977)

SERVICE ARMAMENT CO., for itself and as successor in interest to NAVY ARMS CO., INC. v. THE UNITED STATES

Jerald D. Baronoff for plaintiff. *Clive S. Cummis*, attorney of record. *Sills, Beck, Cummis, Radin & Tischman*, of counsel.

George L. Squires, with whom was *Assistant Attorney General M. Carr Ferguson*, for defendant. *Theodore D. Peyser*, of counsel.

Before COWEN, *Senior Judge*, DAVIS and NICHOLS, *Judges*.

ON THE PARTIES' CROSS-MOTIONS FOR SUMMARY JUDGMENT

COWEN, *Senior Judge*, delivered the opinion of the court:

Plaintiff, a manufacturer and importer whose business involves the sale of muzzle-loading replicas of antique firearms, brought this action to recover excise taxes assessed against and paid by it for the second quarter of 1969 through the third quarter of 1972, in the amount of $226,113.84, plus interest. The sole issue is whether

plaintiff's products are subject to the excise tax imposed by 26 U.S.C. § 4181.

The defendant filed a motion for partial summary judgment on the ground that plaintiff's claims for a refund were not timely with respect to the following:

(a) Amounts claimed by plaintiff for the fourth quarter of 1968 except for $67.99 paid on November 1, 1971.

(b) Amounts claimed by plaintiff for the first quarter of 1969 except for $321.24 paid on March 20, 1972.

(c) Amounts claimed by plaintiff for the second quarter of 1969 except for $335.35 paid on September 1, 1971.

(d) Amounts claimed by plaintiff for the third quarter of 1969 except for $330.88 paid on September 1, 1971.

(e) Amounts claimed by plaintiff for the fourth quarter of 1969 except for $335.06 paid on March 3, 1972.

Plaintiff responded with a cross-motion for summary judgment seeking recovery of the total amount of excise taxes covered by its claims for refund.[1]

Thereupon, the government filed a motion for judgment on the pleadings, which we treat as a cross-motion for summary judgment, because the Government has relied on material outside the pleadings.[2] At oral argument, plaintiff conceded that defendant's motion for partial summary judgment should be granted.

The facts essential to our decision are not in dispute. The taxpayer is an arms manufacturer and importer, whose business involves the sale of replicas of antique firearms to customers desiring them for collection, cultural, and sporting purposes. Taxpayer's prime business is the distribution and sale of muzzle-loading replicas of antique firearms in which powder and a projectile are inserted and the powder is ignited through the use of a flint or cap.

[1] In its motion, plaintiff also seeks a declaratory judgment that its sale and importation of replica firearms is not subject to § 4181. This court does not have jurisdiction to render declaratory judgments except in certain tax cases as provided in 26 U.S.C. § 7428 (Tax Reform Act of 1976), but we may disregard this request for relief, because we have jurisdiction of plaintiff's action for the refund of excise taxes paid if a timely claim for refund has been filed.

[2] Our Rule 38(c) provides: "If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and are not excluded by the court, the motion shall be treated as one for summary judgment * * *."

The precise issue in this case has been decided in favor of the Government in a memorandum opinion[3] of September 13, 1977 by Honorable John F. Grady, Judge of the United States District Court for the Northern District of Illinois, Eastern Division, in Docket No. 74 C 3576, *Mars Equipment Corp. v. United States*. We concur in both the reasoning and the result reached by the District Court and therefore enter a judgment denying plaintiff's motion for summary judgment and granting both of defendant's motions.

However, since some contentions have been made to us that were apparently not raised in the District Court, we shall set forth the basis for our decision in somewhat greater detail than was done in the memorandum opinion of the District Court.

I.

Section 4181 of the Internal Revenue Code imposes a tax on the sale by a manufacturer, producer or importer of firearms (other than pistols and revolvers) and on shells and cartridges of 11 percent.[4] 26 C.F.R. § 48.4181-2 promulgated pursuant to section 4181 defines firearms and shells as follows:

> (c) *Firearms.* The term "firearms" means any portable weapons, such as rifles, carbines, machine guns, shotguns, or fowling pieces, from which a shot, bullet, or other projectile may be discharged by an explosive.
>
> (d) *Shells and cartridges.* The terms "shells" and "cartridges" include any combination of projectile, explosive, and container which is designed, assembled, and ready for use without further manufacture in firearms, including pistols and revolvers.

[3] (1977) 77-2 U.S.T.C. (CCH) para. 16273.

[4] 26 U.S.C. § 4181 provides:

"There is hereby imposed upon the sale by the manufacturer, producer, or importer of the following articles a tax equivalent to the specified percent of the price for which so sold:

"Articles taxable at 10 percent—

"Pistols.

"Revolvers.

"Articles taxable at 11 percent—

"Firearms (other than pistols and revolvers).

"Shells, and cartridges."

It is undisputed that the products against which the tax was assessed and collected are firearms and the plaintiff here admits that both antique and replica firearms, as manufactured and distributed by it, are capable of exploding a projectile from barrels and therefore that these articles fall clearly within the definition of "firearms" in the regulation.

II.

In an effort to show that its antique guns and their replicas are not subject to the excise tax, plaintiff has advanced a number of contentions. Its major argument is that by statutory changes made in 1954 and 1968 in the definition of "firearms," Congress evinced an unmistakable intent to relieve the antique and replica firearms from the onus of excise taxation. In order to deal with this contention, it is necessary to consider the legislative history of section 4181 and its predecessors, Chapter 53 of the Internal Revenue Code of 1954 (which replaced Chapter 25 of the Internal Revenue Code of 1939), and the Gun Control Act of 1968, 82 Stat. 1213.

The National Firearms Act (48 Stat. 1236) was approved June 26, 1934. Its primary purpose was to make it "more difficult for the gangster element to obtain certain types of weapons." *See* S. Rep. No. 1303, 86th Cong., 2d Sess. p. 2 (1960–1 C.B. 848, 849). Part of the National Firearms Act was codified in section 2733(a) of the Internal Revenue Code of 1939 (26 U.S.C. 1952 ed.). In section 2733(a), firearms were defined to include all weapons, except pistols and revolvers, from which a shot is discharged by an explosive if the weapon is capable of being concealed on the person. This provision was interpreted by the Treasury Department to include antique and replica firearms.

Plaintiff relies on section 5848 of the Internal Revenue Code of 1954 (68A Stat. 726), which amended section 2733 of the 1939 Code to exclude antique firearms by providing that "weapon" as therein defined does not include one which is not capable of being fired with fixed ammunition.

Congress stated that the purpose of the change in definitions as set forth in new section 5848 was as follows:

§ 5848. Definitions

> This section is the same as present section 2733, except that three new provisions have been added which define "rifle," "shotgun," and "any other weapon." These new definitions are needed for the reason that Congress did not define such weapons when the National Firearms Act was enacted in 1934 although it did define "machinegun." Since Congress did not define these weapons it has been necessary to use the ordinarily accepted definitions thereof appearing in acceptable, standard dictionaries. In so doing, and because of a technical application of the definition of the term "firearm," as it appears in the present statute, many weapons firing projectiles by the action of an explosive have been brought within the scope of the National Firearms Act although it is believed the Congress did not intend that such weapons should be included. For example, under a technical interpretation of the term "firearm," blunderbusses, muzzle-loading shotguns, and other ancient or antique guns have been considered subject to the National Firearms Act and in many instances the requirements thereof have been imposed. As a result of these interpretations, over a period of years, restrictions have been imposed on a certain class of persons, namely, antique gun collectors, and it is felt that these restrictions should be removed in pursuance of the clearly indicated congressional intent to cover under the National Firearms Act only such modern and lethal weapons, except pistols and revolvers, as could be used readily and efficiently by criminals or gangsters. Moreover, for proper administration of the National Firearms Act it is considered highly proper and desirable that the Congress define the terms "rifle," "shotgun," and "any other weapon" so as to remove any doubt as to the type of firearms which Congress intended to bring within the scope of the National Firearms Act. [H.R. Rep. No. 1337, 1954 *U.S. Code Cong. and Adm. News*, p. 4542, 83d Cong., 2d Sess.].

Prior to the 1954 amendment, antique gun collectors and other owners of these weapons were subject to a number of restrictions imposed by the National Firearms Act, which had been codified in Chapter 25, Subchapter B of the Internal Revenue Code of 1939 (26 U.S.C. 1952 ed.). These

included a requirement for the registration of a firearm by every person possessing one (section 2720(d)); a provision declaring it to be unlawful for any person to transfer a firearm except on a written order set forth on an application form issued by the Commissioner (section 2723), and a provision making it unlawful to possess any firearm transferred in violation of the provisions of Subchapter B or to change the identification marks on any firearm (section 2726(a) and (b)). Penalties were prescribed for violations of the provisions of Subchapter B (section 2729) and for the forfeiture of any firearm transferred in violation of the provisions of that subchapter (section 2730). These restrictions were re-enacted without substantial change in 1954 in Chapter 53 of the Code. Some of the same restrictions were also re-enacted in the Gun Control Act of 1968 and are codified in Chapter 53 of the Code.

We think it is apparent from the legislative history cited above that section 5848 was enacted to relieve antique gun collectors from the restrictions imposed upon them by prior law, and we find nothing in the legislative history or the language of the amendment to indicate that Congress intended to exempt antique firearms from the tax imposed by section 4181 of the 1954 Code, which was passed at the same time. Plaintiff agrees that the "manufacturer's excise tax applicable to firearms was routinely re-enacted in the 1954 Code and renumbered as § 4181."[5] As we shall show, *infra*, Congress is deemed to have been aware in 1954 of a 1935 Treasury regulation which defined firearms in language which included the firearms in issue here.

Plaintiff also relies heavily on the Gun Control Act of 1968 (82 Stat. 1213) which contained a general revision of Chapter 53 of the Code. The revision included a new section 5845 (codified as 26 U.S.C. § 5845) which replaced section 5848 for the definition of firearms. Section 5845(a) provides in part as follows:

> * * * The term "firearm" shall not include an antique firearm or any device (other than a machinegun or destructive device) which, although designed as a weapon, the Secretary or his delegate finds by reason of the date of its manufacture, value, design, and other characteristics is primarily a collector's item and is not likely to be used as a weapon.

[5] Plaintiff's Brief at p. 12.

In subsection (g) of section 5845, "antique firearm" is defined as a firearm or replica thereof which was not designed or redesigned for using rim fire or conventional center fire ignition with fixed ammunition.

Section 5845 excludes antique weapons and replicas thereof from the definition of firearms for the purposes of the other provisions of Chapter 53 of the Code. However, the declared purpose of the Gun Control Act of 1968 is "to provide support to Federal, State, and local law enforcement officials in their fight against crime and violence * * *." (82 Stat. 1213). Plaintiff has pointed to nothing in the language of the statute or its legislative history, which indicates that a definition in a law enacted to fight crime was intended to apply to or affect an excise tax provision which was enacted for the purpose of producing revenue. The language of section 5845 is to the contrary, for its opening line reads: "For the purpose of this chapter—." Without more, this express limitation is sufficient to convince us that section 5845 was not intended to apply to section 4181, which is contained in Chapter 32 of the Code, entitled "Manufacturers Excise Taxes."

In contrast to plaintiff's failure to furnish any persuasive support for its position in the cited portions of the 1954 and 1968 Acts, we find that the legislative re-enactment of the excise tax on firearms, coupled with a consistent administrative interpretation over a period of many years, strongly supports the Government's contentions.

An excise tax on firearms was first enacted in the Revenue Act of 1918 (40 Stat. 1122) to raise revenues to defray war expenses. This law continued in effect until 1926 when the tax on firearms (except pistols) was eliminated. Because of the reduction in receipts from income taxes as a result of the depression, Congress again imposed the excise tax on firearms in the Revenue Act of 1932, 47 Stat. 264. See H.R. Rep. No. 708, 72d Cong., 1st Sess., pp. 3, 8 (1939–1 C.B. (Part 2)) 457, 458–59, 463. The

statutory language was almost identical to that in current section 4181.

In 1935, the Treasury Department issued Article 58, Treas. Reg. 46, defining the term "firearms" as used in the 1932 Act as follows:

> The term "firearms" as used in the Act includes all portable weapons, such as rifles, carbines, machine guns, shotguns, and fowling pieces, from which a shot, bullet, or projectile may be discharged by an explosive.

In 1960, Treasury promulgated the current regulation, section 48.4181–2(c), quoted *supra*. The definition of firearms therein is virtually identical to that set forth in the 1935 regulation.

Thus, the definition of "firearms" in the regulations has remained with no significant change since 1935. The reenactment in section 4181 of prior law without substantial amendment, plus the Treasury's long-standing and consistent administrative interpretation, must be deemed to have received Congressional approval. *United States v. Leslie Salt Co.*, 350 U.S. 383, 396–97 (1956); *Knapp King-Size Corp. v. United States*, 208 Ct. Cl. 533, 548; 527 F. 2d 1392, 1400 (1975).

The consistent administrative interpretation of section 4181 is further demonstrated by a revenue ruling that has been outstanding for almost 20 years. Rev. Rul. 57–606, 1957–2, C.B. 733 provides as follows:

> Whether a firearm is an antique is immaterial in determining the applicability of the manufacturers excise tax. Accordingly it is held that sales of antique firearms by an importer are subject to the manufacturers excise tax imposed by section 4181 of the Code.

Rev. Rul. 74–137, 1974–1, C.B. 313 also relates to the excise tax on replicas of antique pistols, revolvers and rifles, and reaches the same conclusion.

III.

Plaintiff's next challenge to the taxability of its products is based on the Act of September 2, 1937, 50 Stat. 917 (codified at 16 U.S.C. § 669(b)), which set aside the proceeds

of the firearms excise tax for the aid of wildlife restoration projects. On account of the earmarking of the tax collections, plaintiff argues that the tax became, in effect, a user charge imposed on hunters who are the prime beneficiaries of Federal expenditures for wildlife restoration, and consequently, that only firearms used in hunting should be subjected to the tax.

Plaintiff maintains that since those who purchase replicas of antique firearms are seldom beneficiaries of the wildlife restoration projects, Congress did not intend that the excise tax should be borne by owners of antique weapons. This is an interesting and ingenious argument, but we reject it, because there is nothing in either the language or the legislative history of 16 U.S.C. § 669(b) to indicate that Congress intended to amend the excise tax law enacted in 1932 to tax only weapons used in hunting wild animals. Moreover, as the District Court observed in *Mars Equipment Corp. v. United States*, *supra*, there is "no legal requirement that the taxpayer be the direct beneficiary of a tax."

IV.

Plaintiff's final argument is that Congress intended a congruency between the firearms and the ammunition which are taxed in section 4181. Specifically, plaintiff asserts that "the plain meaning and objective of taxing shells and cartridges, as well as firearms, is to tax those shells and cartridges which are used within those firearms." Plaintiff calls attention to 18 U.S.C. § 845(a)(5), which exempts from the regulatory provisions on explosives the purchase of commercially manufactured black powder and certain igniters in amounts not exceeding 5 pounds, where these are intended to be used for sporting, recreational, or cultural purposes in antique weapons.

Since section 4181 does not include within its terms commercially manufactured black powder and percussion caps, the only ammunition which antique firearms are designed to use, plaintiff says that it follows that Congress did not intend to tax antique weapons. Although there is

some logic in this argument, it is far outweighed by the other factors which we have discussed above. Those factors more directly and specifically reveal the Congressional intent to tax the firearms in issue. Therefore, we cannot accept plaintiff's argument as a basis for decision.

CONCLUSION

It follows from the foregoing opinion that plaintiff's motion for summary judgment is denied; defendant's motion for partial summary judgment and its motion for judgment on the pleadings, which we have treated as a motion for summary judgment, are granted and plaintiff's petition is dismissed.

No. 77-1282

In the Supreme Court of the United States

OCTOBER TERM, 1977

SERVICE ARMAMENT CO., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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SERVICE ARMAMENT CO., PETITIONER

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that its replicas of antique firearms, which are capable of discharging projectiles, are not subject to the federal excise tax that 26 U.S.C. 4181 imposes on "firearms."

Petitioner manufactures and imports replicas of muzzle-loading antique firearms. The replicas may be fired by inserting powder and a projectile in the barrel, and igniting the powder with a flint or cap (Pet. App. 1a-2a).

The Commissioner of Internal Revenue determined that petitioner was liable for the excise tax on the sale of firearms by a manufacturer or importer imposed by 26 U.S.C. 4181, which is contained in Chapter 32 of the Internal Revenue Code of 1954 (Pet. 6). Chapter 32 does not define the term "firearms," but the term is defined in Treasury Regulations on Manufacturers and Retailers

Excise Taxes, 26 C.F.R. 48.4181-2(c), to mean "any portable weapons * * * from which a shot, bullet, or other projectile may be discharged by an explosive." Petitioner does not dispute that this definition covers its products, but contends that the regulation is inconsistent with the statute because other provisions in the tax code and the criminal code expressly exempt antique firearms and their replicas from those provisions.

Petitioner paid the tax and brought this refund suit in the Court of Claims. The court sustained the Commissioner's determination (Pet. App. 1a-10a). The court noted that the definitional regulation was first promulgated in 1935, and that Congress, in reenacting Section 4181, did not provide a contrary statutory definition; it concluded that this regulation "must be deemed to have received Congressional approval" (Pet. App. 8a).

In addition, the court noted that the express statutory exclusion of antique firearms and replicas from the definition of "firearms" in 26 U.S.C. 5845 and its predecessors was limited to Chapter 53 of the Internal Revenue Code (Pet. App. 4a-7a) and was intended to relieve antique gun collectors from registration and transfer requirements otherwise imposed by that chapter. The court also rejected petitioner's arguments that its products are exempt because (1) they are not used for hunting and, therefore, their owners do not benefit from the wildlife restoration projects financed by the proceeds of the firearms excise tax, and (2) they do not use shells and cartridges subject to the tax on ammunition under Section 4181 (Pet. App. 8a-10a).

The decision below is correct and there is no conflict or other reason for this Court's review.

1. The Secretary's definition of "firearms" under Section 4181 to include all portable weapons capable of firing projectiles by explosives is reasonable; it has been consistent and long-standing;[1] and Congress has reenacted the relevant statute without change. In those circumstances, the Secretary's definition "should not be overruled except for weighty reasons." *Commissioner* v. *South Texas Lumber Co.*, 333 U.S. 496, 501. See also *Saxbe* v. *Bustos*, 419 U.S. 65, 74; *Bingler* v. *Johnson*, 394 U.S. 741, 749-750.

Petitioner has advanced no such reasons. The fact, relied on by petitioner, that other statutory provisions (18 U.S.C. 921 and 26 U.S.C. 5845) expressly exclude replicas of antique firearms from the coverage of their respective chapters[2] (which do not include Section 4181) does not support petitioner. To the contrary, Congress' failure to make a similar exemption in Section 4181 suggests a legislative intent that antiques not be excluded from that section and that the term "firearms" there was intended to have a broader scope.

In any event, as the Court of Claims noted, the purposes of Section 4181 are different from those of 26 U.S.C. 5845 (part of the National Firearms Act of 1934) or 18 U.S.C. 921 (part of the Gun Control Act of 1968). As its history reflects, Section 4181 has always been an excise tax designed to raise revenue (see Pet. App. 7a). The principal purpose of the National Firearms Act, on

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[1]As the Court of Claims noted (Pet. App. 8a), not only was the definitional regulation promulgated in 1935 but also a revenue ruling issued in 1957 stated that antique firearms "are subject to the manufacturers excise tax imposed by section 4181 of the Code." Rev. Rul. 57-606, 1957-2 Cum. Bull. 733.

[2]18 U.S.C. 921(a) commences "[a]s used in this chapter—" and 26 U.S.C. 5845 commences "[f]or the purpose of this chapter—."

the other hand, was to make it "more difficult for the gangster element to obtain certain types of weapons." S. Rep. No. 1303, 86th Cong., 2d Sess. 2 (1960). In furtherance of that purpose, the Act includes requirements for the registration of firearms, and various prohibitions on transfers, alterations and so forth. As the Court of Claims noted (Pet. App. 6a), Congress' amendment of the Firearms Act in 1954 to exclude antiques and replicas was intended to relieve antique gun collectors and dealers from restrictions that were unnecessary in view of that Act's principal purpose.[3]

Similarly, as this Court has recognized, the Gun Control Act of 1968 was also designed to control firearms for law enforcement purposes; the Act "sought broadly to keep firearms away from the persons Congress classified as potentially irresponsible and dangerous." *Barrett* v. *United States,* 423 U.S. 212, 218. The fact that Congress in the National Firearms Act and the Gun Control Act did not view antique firearms and their replicas as presenting significant law enforcement problems does not suggest that Congress intended to exclude those articles from a purely revenue raising statute.

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[3]There is no basis for petitioner's assertion (Pet. 14) that the excise tax imposed by Section 4181 and the National Firearms Act of 1934 have "common roots." The excise tax was first enacted in 1918. Moreover, the Senate Report on the National Firearms Act states, in connection with the definition of firearms contained in the predecessor of Section 5845, that the taxes imposed by the Firearms Act (of which Section 5845 is a part) "are wholly separate from the * * * taxes applying to the manufacturer's or importer's sale of pistols, revolvers, and other ordinary firearms (sec. 4181)." S. Rep. No. 1303, *supra*, at 2.

Petitioner's reliance (Pet. 17) on *Sonzinsky* v. *United States,* 300 U.S. 506, is also unfounded. In upholding the constitutionality of the National Firearms Act as within the taxing power, the Court made clear that it was not basing its decision on the underlying purpose of the statute.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

MAY 1978.

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